



Office of the Attorney General

State of Texas

August 21, 1998

DAN MORALES
ATTORNEY GENERAL

Mr. Claud H. Drinnen
First Assistant City Attorney
City of Amarillo
P.O. Box 1971
Amarillo, Texas 79105-1971

OR98-1999

Dear Mr. Drinnen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 117748.

The City of Amarillo (the "city") received a request for the following information:

a summary of the tabulations for the Request for Proposals for Auctioneering Services; from the evaluation committee, a copy of each of the member's ranking decisions, and a copy of the proposal submitted by Mr. George Gideon, who was awarded the contract.

On behalf of George Gideon Auctioneers, Inc. ("Gideon Auctioneers"), you assert that the requested documents are excepted from disclosure under section 552.110 of the Government Code and section 252.049 of the Government Code.

Because the proprietary interests of Gideon Auctioneers may be implicated by the release of the requested information, we notified Gideon Auctioneers about the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). Gideon Auctioneers responded to the notice by claiming that sections 2, 3, and 6 of its bid proposal are proprietary information that should not be released. Having reviewed its arguments against disclosure, we assume that Gideon Auctioneers intended to raise section 552.110 of the Government Code.

Section 252.049 of the Local Government Code provides as follows:

(a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.

(b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

In instances where the contract has been awarded, this provision merely duplicates the protection of section 552.110 of the Government Code. Since the city has awarded its contract for auctioneering services to Gideon Auctioneers, we will limit our discussion to the issue of whether the requested information is excepted from disclosure under section 552.110 of the Government Code.

Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one submits an argument that

rebutts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.¹

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 to commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

The city has not made any specific arguments against the disclosure of the requested information. Gideon Auctioneers has not presented a *prima facie* case for exception of its bid proposal under the trade secret prong of section 552.110. A company must ordinarily show what efforts have been made to keep information confidential in order for it to qualify as a "trade secret" under section 552.110, and Gideon Auctioneers has not addressed this crucial aspect of the trade secret burden. See Open Records Decision Nos. 255 (1980), 232 (1979). Thus, we conclude that the requested information is not excepted from disclosure under the trade secret prong of section 552.110.

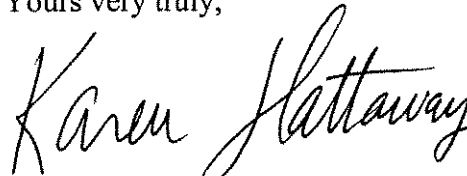
We also find that the requested information is not protected commercial or financial information. Gideon Auctioneers argues that the public release of sections 2, 3, and 6 of its bid proposal would give an advantage to its competitors in future bidding processes. However, section 2 of the bid proposal consists primarily of advertisements that have already been published and publicly disseminated. Gideon Auctioneers has not explained how releasing the advertising specifications (section 2) and time line (section 6) for this particular contract will cause it to suffer substantial competitive harm in future bidding situations. Finally, Gideon Auctioneers has not offered any specific arguments as to how releasing

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

section 3 (auction company experience) would cause it to suffer substantial competitive injury. For these reasons, we conclude that the requested information is not excepted from disclosure under the second prong of section 552.110. Because the requested information is not excepted from disclosure under either prong of section 552.110, the city must release the information to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/mjc

Ref: ID# 117748

Enclosures: Submitted documents

cc: Mr. Rene Bates
Rene Bates Auctioneers, Inc.
Rt 4
McKinney, TX 75070-9603
(w/o enclosures)